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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 1088

JOHN B. BAILEY,
Petitioner,

vs.

SANDELL, INC., a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal
of the State of California
Fifth Appellate District

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California, Fifth Appellate District, entered in the above case on February 13, 1963, which affirmed the judgment of the Superior Court of the State of California in and for the County of Fresno.

a court of general jurisdiction, and which Superior Court had entered judgment in favor of respondent after a trial on the merits in the sum of Fifty Thousand Dollars, plus Five Thousand Dollars attorneys' fees, plus interest;

That on February 28, 1963, petitioner filed a Petition for Rehearing in the said District Court of Appeal, and that thereafter and on March 11, 1963 said District Court of Appeal denied said Petition for Rehearing; that thereafter on March 26, 1963, petitioner filed his Petition in the Supreme Court of the State of California for a hearing on said matter, and that thereafter and on April 9, 1963, the said Supreme Court of California denied said Petition for a Hearing.

That said District Court of Appeal is an intermediate Court between the said Superior Court and said Supreme Court of California, and said District Court of Appeal had jurisdiction to hear said appeal above referred to.

OPINION BELOW

The judgment of the Superior Court of the State of California in and for the County of Fresno is not reported. The judgment of the District Court of Appeal of the State of California, Fifth Appellate District is reported in 212 ACA 935, and a copy of said opinion of the said District Court of Appeal is attached hereto (Appendix A).

That the opinion of the Supreme Court of the State of California denying petitioner's hearing is not reported but that a copy of the minute order is attached hereto (Appendix B).

JURISDICTION

The jurisdiction of this court is invoked pursuant to Title 28, Section 1257 of U.S.C.A., and Amendment XIV to the United States Constitution.

QUESTIONS PRESENTED

1. Whether a broker dealer licensed by the Securities and Exchange Commission of the United States can sell stock issued under an exemption from registration without obtaining a favorable ruling upon a proposed sale to the general public by the Securities and Exchange Commission of the United States; and

2. Whether a Court can rewrite an agreement by omitting material language intentionally inserted in the agreement by the parties.

FACTS

Petitioner is a stockbroker at all times licensed by the Securities and Exchange Commission. He was underwriter on an issue of stock in the Cleary Oil Corporation, a Canadian corporation, which stock was

sold pursuant to an exemption from the provisions of the Securities Act of 1933. The stock was sold under an Offering Circular dated November 18, 1954. The Cleary Oil Corporation was engaged in leasing oil properties in Canada, drilling on proven locations, and the sale of oil.

In March 1955, all of the shareholders of Cleary Oil Corporation, including petitioner, were given an opportunity to exercise preemptive rights to purchase additional shares of stock in the corporation at the rate of one for one. The president and sole owner of respondent was V. I. Sandell, and Sandell was also a shareholder included in the preemptive rights offering. Petitioner and Sandell were both directors of the corporation in March 1955. Petitioner was a substantial shareholder in the company, and was desirous of purchasing all of the shares to which he would be entitled under the preemptive rights offering, and to be able to do so, borrowed from respondent corporation $50,000.00, which loan is the subject of this action. The parties met in the office of petitioner on April 1, 1953 and together drew up a note as follows:

> "*$50,000.00* Fresno, Calif. *April 1, 1955* *Eight months and 19 days or as otherwise agreed* after date, without grace, for value received *I* promise to pay to *Sandell Inc.* or order, the sum of *Fifty thousand* - - - - - Dollars with interest thereon at the rate of *5 (five) percent* per *annum* from date until paid. Interest to be paid *on maturity* and if not so paid as it becomes dues, to bear interest at the same rate as said principal

sum, but if default is made in the payment of interest that the principal sum of this note shall immediately become due at the option of the holder thereof. If suit is brought to collect this note, I agree to pay any attorney's fee incurred for collection. All payments which become due are to be made in United States Lawful Money.

John B. Bailey

Address: 2133 Fresno Street
Fresno, California
2303 Fresno Street"

At the same time, the parties entered into an oral agreement which was reduced to writing by them on April 15, 1955. The agreement is as follows:

"April 15, 1955

The following is an agreement entered into between Sandell Inc. and John B. Bailey in consideration of a loan by the first party to the second party of $50,000, receipt of which is hereby acknowledged by second party.

As security for the aforesaid loan, John B. Bailey does hereby deposit with Victor I. Sandell, as Trustee, one certificate number 5, for 5,000 shares of Cleary Oil Company Limited, Capital Stock. Said loan will also be evidenced by a note in the amount of $50,000, bearing interest at the rate of 5%. Said note shall be due and payable on January 15, 1956, *or as soon thereafter as clearance is granted by the S.E.C.* for the sale by Party of the Second Part, of Cleary Oil Company Limited, Capital Stock shares, purchased under the offering circular, dated November 18, 1954. These shares are to be released to John B. Bailey upon the payment of $5,000 for each 500

shares held as security. *As consideration for this loan*, John B. Bailey does hereby grant to Victor I. Sandell, an option to purchase 1500 shares Cleary Oil Company Limited, Capital Stock at $10.50 per share, U.S. Funds. This option will become effective on November 19, 1955, or as soon thereafter as clearance is granted from the S.E.C. for John B. Bailey to transfer those shares from stock purchased under an offering circular, dated November 18, 1954.

In no event shall Victor I. Sandell, as Trustee, be required to return to John B. Bailey, the 1500 shares held by him for the exercise of his option until the option is exercised.

In the event Victor I. Sandell exercises his option before the note herein mentioned becomes due and payable, the purchase price of the stock shall be remitted by Party of the Second Part as payment upon said note.

/s/ John B. Bailey

Sandell Inc.
By: V. I. Sandell, Pres.
V. I. Sandell"

(Emphasis ours.)

On July 5, 1957, plaintiff filed suit against petitioner and the First Amended Complaint, on which the issues were joined, alleged that at no time had the Securities and Exchange Commission, known as the S.E.C., provided for the granting of a clearance, or required the granting of a clearance for the sale by petitioner of the shares mentioned in the agreement, and that the S.E.C. was and is without authority to and could not grant such a clearance and that

the same was not possible. Plaintiff further alleged that the note became due on January 15, 1956, which date was a reasonable time following the execution of the note for its maturity.

Petitioner in his answer denied the allegations of the complaint as set forth, and affirmatively alleged that the S.E.C. did have power and authority at all times to grant a clearance. Petitioner further denied that the note in question became due on January 15, 1956, or that it became due at all. Petitioner admitted that he made no cash payment upon the note, but alleged that the option granted to V. I. Sandell, plaintiff's alter ego, for the purchase of 1500 shares at the price of $10.50 per share under the written agreement was of a fair market value at the time it was granted of not less than $50,000.00. As a special defense, petitioner pleaded that clearance is a condition precedent to liability on the note, and that the same was a material part of the contract, which had not been fulfilled.

The trial court found that the note was due ninety days after January 15, 1956, and that the purpose of inserting the provision for clearance was to enable petitioner to become assured that he could safely sell the shares of stock mentioned in the agreement. Judgment was rendered for the full amount plus attorney's fees.

I

WHETHER A BROKER DEALER LICENSED BY THE SECURITIES AND EXCHANGE COMMISSION OF THE UNITED STATES CAN SELL STOCK ISSUED UNDER AN EXEMPTION FROM REGISTRATION WITHOUT OBTAINING A FAVORABLE RULING UPON A PROPOSED SALE TO THE GENERAL PUBLIC BY THE SECURITIES AND EXCHANGE COMMISSION (WITHOUT VIOLATING THE PROVISIONS OF 15 U.S.C.A. 77e).

The trial court found (Finding 5) that the parties intended that the provision for granting of clearance was to enable petitioner to have a reasonable time to assure himself that he could safely sell the stock purchased by him under the Offering Circular of November 18, 1954, without being in violation of the regulations of the Securities and Exchange Commission; and (Finding 6) that a reasonable time for obtaining such clearance was ninety days after January 15, 1956.

Suit was filed on July 7, 1957.

The District Court of Appeal variously found (Appendix A) that clearance did not exist, and if it did, that petitioner would not need it. To make such a conclusion, the District Court must have found that there was no restriction of any kind, nor any possible restriction upon the sale by appellant of the shares purchased under the Offering Circular of November 18, 1954. The confusion of the District Court of Appeal on this issue appears to be a basic misunderstanding of the definition of the term "underwriter". In addition to the fact that petitioner was the underwriter of the stock sold under the November 18, 1954 offering circular, petitioner may also be an under-

writer under the Securities Act of 1933 (15 U.S.C.A. 77). It is uncontradicted that petitioner purchased stock under the November 18, 1954 offering circular.

15 U.S.C.A. 77e reads as follows:

"5. 77e

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

1. to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

2. to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security, for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

1. to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 77j of this title; or

2. to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection a of 77j of this title.

(c) It shall be unlawful for any person directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title."

Certain transactions are exempted under 15 U.S.C.A. 77 d (1):

"4 *77d* Exempted transactions.

The provisions of section 77e of this title shall not apply to any of the following transactions:

(1) Transactions by any person *other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering;* or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction) except transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter, and transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the

public by the issuer or by or through an underwriter after such effective date whichever is later . . .; and except transactions as to securities constituting the whole or a part of an unsold allotment to or *subscription* by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders." (Emphasis ours.)

In order to properly interpret 77 d, it is necessary to refer to 77 b (11), which defines the term "underwriter." It is defined as follows:

"77 b (11) The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term issuer shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.";

Thus it is seen that the term "underwriter" is used in the Securities Act of 1933 not only in the common

parlance of the financial world, but also referring to persons regardless of their occupation who have purchased stock.

It will be remembered that no registration statement was in effect at the time of the November 18, 1954 offering circular, but the stock was offered pursuant to exemption from registration. This exemption applied only to the first sale of the stock.

Appellant purchased 5,000 shares individually under the Offering Circular and his securities firm had acquired 3,174 shares by purchase under the Circular. (R.T. p. 23, lines 10 through 21.) There is no evidence that appellant gave an investment letter or other assurance to the company at the time of his purchases under the Offering Circular. Thus no sale by appellant to the general public could be made without action of the Securities and Exchange Commission because appellant was a *statutory underwriter* under Section 77 c. That is, he purchased the shares under the Offering Circular with a view to further distribution. Distribution or sale of such shares to the general public without the safeguards set up by the Securities Act of 1933 is unlawful, voidable, and subjects appellant to loss of his license as a broker-dealer (15 U.S.C.A. 77 o (b)) and loss of his trading rights as a member of the National Association of Securities Dealers. Further, upon an attempt by appellant to sell such stock to the general public, he would be subject to injunction by the Securities and Exchange Commission.

Some of the leading cases which discuss these problems are as follows:

Securities Exchange Commission v. Mono-Kearsage Con. Min. Co., 167 F. Supp. 248 (1958)

was an action for an injunction against defendants for selling stock in a corporation. The corporation contended its delivery of stock to one Boren and his nominees was exempt under 15 U.S.C.A. 77 d (1) as a transaction by an issuer not involving any public offering. It was held that the burden of proof is upon the person claiming an exemption to show that it applies. The corporation would have reason to know, and did know, before it made the transfers in question that Boren recognized no limitations upon retransfer, that the corporation was the issuer. Boren and his associates were held to be underwriters under Section 77 b (11), in that they purchased from an issuer with a view to distribution of the stock.

Gilligan Will & Co. v. Securities and Exchange Commission, 267 Fed. (2) 461 (1959)

relates to proceedings on a petition for review of an order of the Securities and Exchange Commission suspending the membership of a registered broker-dealer partnership in the National Association of Securities Dealers for violation of the Securities Act. Petitioners were the underwriters for Crowell-Collier who acquired and distributed debentures and common stock which were not registered. Petitioners asserted that they were not statutory underwriters within the meaning of the exemption provided by the first clause

of Section 77 d (1). It was held that resales were contemplated and executed by the petitioners amounting to a distribution or public offering as defined by the Supreme Court in the *Ralston Purina* case; petitioners were found to be underwriters and the transactions were not exempt under Section 77 d (1). The Court went on to state in the *Gilligan* case that at the least, to establish entitlement to any numerical exemption in such circumstances shown there, the petitioners would have to establish a reasonable and bona fide belief that the total number involved in the placement would remain within the exemption. Otherwise, although a general public placement could be effected by a series of transfers to a small number of buyers, each distributor would be entitled to an exemption on the ground that it transferred to only a small number of buyers.

The petitioners in the *Gilligan* case also asserted that since the conversions and sales occurred more than ten months after their purchase of debentures, the Commission must find that they were held for investment. As proof of this, they cited a change of circumstances in the Crowell-Collier Company as changing their intention stated at the time of their purchase. The court held against petitioners there in language as follows:

> "We agree with the Commission that in the circumstances here presented the intention to retain the debentures only if Crowell-Collier continued to operate profitably was equivalent to a purchase with a view to distribution within the

> statutory definition of underwriters set forth in Section 77 d (1). To do otherwise would be to permit a dealer who speculatively purchases an unregistered security in the hope that the financially weak issuer had, as is stipulated here, turned the corner, to unload on the unadvised public what he later determines to be an unsound investment without the disclosures sought by the securities laws, although it is in precisely such circumstances that disclosure is most necessary and desirable. The Commission was within its discretion in finding on this stipulation that petitioners bought with a view to distribution despite ten months holding."

In *Securities and Exchange Commission v. Ralston Purina Company,* 346 U.S. 119, 73 S. Ct. 981, 97 L. Ed. 1494 (1953), the Supreme Court considered the exemptions provided by 77 d (1). It held that an issuer who claims the benefit of an exemption from 77 e for the sale of an unregistered security has the burden of proving his entitlement to it. The rationale of this result applies as well to a broker-dealer who claims the benefit of a similar exemption. Thus the burden of proof was on the petitioners to establish that they were not underwriters within the meaning of 77 d (1) (Sec. 4 (1)).

The Court in the *Ralston Purina* case also defined the standard to be applied in determining whether an issue is a public offering. It held that the governing fact is whether the persons to whom the offering is made are in such a position with respect to the issuer that they actually either have such information as a

registration would have disclosed, or have access to such information. (346 U.S. 125-127.)

The Court stated:

> "The statute would seem to apply to a 'public offering' whether to few or many . . . anything from two to infinity may serve: perhaps even one." (p. 125.)

The decision of the District Court of Appeal of California is contrary to the three Federal cases cited, in that it holds that a person in the position of petitioner could lawfully and safely sell an unregistered security to the general public without notice to, or consent of, the Securities and Exchange Commission. Petitioner, being in the business of selling securities, provided a safeguard against being forced to sell the stock, to pay the debt, unless he was assured that such a sale was lawful.

II

A COURT CANNOT REWRITE THE AGREEMENT OF THE PARTIES BY OMITTING MATERIAL LANGUAGE.

The petitioner and the said V. I. Sandell, when the agreement of April 15, 1955, was entered into as a part of the transaction when the note was executed, were both experienced in the sale and purchase of corporate stock and were familiar with the rules and regulations of the Securities and Exchange Commission of the United States.

The contract of April 15, 1955, between petitioner and respondent and executed by V. I. Sandell as

president of Sandell, Inc., a corporation, provided that "said note shall be due and payable on January 15, 1956, or as soon thereafter as clearance is granted by the SEC."

It is conceded by all parties that the clearance was necessary before the note became due and that said clearance was never obtained from the SEC. The Court held that the clearance was not necessary and in effect the Court rewrote the contract of the parties. The evidence is clear in this case that it was the intention of the parties that before the note could become due that a clearance must be had and that the clearance condition was a condition precedent to the due date of the note.

By ignoring the clearance condition the Court rewrote the agreement of the parties and in so doing deprived petitioner of his rights without due process of law.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN C. BURKE,
Counsel for Petitioner.

ANNETTE LA RUE,
LAWRENCE W. YOUNG,
Of Counsel.

(Appendices Follow)

Appendix A

(Vol. 212 A.C.A. 935)

In the District Court of Appeal
State of California
Fifth Appellate District

5 Civil No. 116

Sandell, Inc., a corporation,
Plaintiff and Respondent,
vs.
John B. Bailey,
Defendant and Appellant.

Opinion

Appellant appeals from a judgment in favor of respondent for $50,000 due on a note, plus interest and attorneys' fees.

Appellant was a director of Cleary Oil Company Limited, a Canadian corporation, from its inception until October 1955, and Victor I. Sandell was appointed a director of this corporation in February 1955, later becoming its president in 1956.

The corporation, Cleary Oil Company Limited, issued an offering circular dated November 18, 1954, offering for sale 28,570 shares of the corporation at $10.50 per share upon the face of which is printed,

"These securities are offered pursuant to an exemption from registration with the United States Securities and Exchange Commission." Such circular stated that after the payment of 10 per cent commission, $238,500 of the proceeds would be applied against the indebtedness of the company and its subsidiary, and only $21,000 would be added to working capital. At the time of the circular appellant owned 13,174 shares personally and as a partner in Bailey and Company, and Mr. Sandell owned 3,810 shares. Appellant was one of the signers of the circular, and the underwriter in charge of the sales, but was not a subscriber.

A permit was issued by the Division of Corporations of the State of California on October 22, 1954, which, upon its face stated, "This issue is considered highly speculative" and further, that the permit "does not constitute a recommendation or endorsement," being permissive only.

A permit was also issued by the Division of Corporations on March 16, 1955, in which the corporation was authorized to sell to its then stockholders 48,570 of its shares at $10.50 per share to be deposited with an escrow holder.

All of the shareholders in this corporation exercised their preemptive rights to purchase from the corporation under the offering circular one share for each share owned, and appellant not having sufficient cash available to do so and being anxious to exercise his preemptive rights, obtained a loan from the respondent for $50,000 and executed a note dated April 1, 1955, for that amount, payable 8 months and 19 days

thereafter or as otherwise agreed, plus interest at 5 per cent per annum, and attorneys' fees. At the same time the appellant and the respondent and Mr. Sandell agreed orally, which agreement was reduced to writing on April 15, 1955, that the terms governing the loan of $50,000 as well as security for the loan whereby the appellant deposited with Mr. Sandell, as trustee, 5,000 shares of Cleary Oil Company Limited capital stock, would include the following:

"Said note shall be due and payable on January 15, 1956, or as soon thereafter as clearance is granted by the S.E.C. for the sale by Party of the Second Part, of Cleary Oil Company, Limited, Capital Stock shares, purchased under the offering circular dated November 18, 1954."

It further provided: "As consideration for this loan, John B. Bailey does hereby grant to Victor I. Sandell, an option to purchase 1500 shares Cleary Oil Company Limited, Capital Stock at $10.50 per share, U. S. Funds. This option will become effective on November 19, 1955, or as soon thereafter as clearance is granted from the S.E.C. for John B. Bailey to transfer those shares from stock purchased under an offering circular, dated November 18, 1954.

"In no event shall Victor I. Sandell, as Trustee, be required to return to John B. Bailey the 1500 shares held by him for the exercise of his option, until the option is exercised."

On July 5, 1957, respondent filed suit against appellant alleging the note, that it was due and unpaid,

that the agreement along with the note provided for payment to be due January 15, 1956, or as soon thereafter as clearance was granted by the Securities and Exchange Commission for the sale by defendant (appellant herein) of the Cleary Oil Company Limited capital stock which he purchased under the offering circular; that there are no laws of the United States nor any rules by the commission which provide for the granting of such a clearance; that the S.E.C. does not have power to grant such a clearance; that the note became due January 15, 1956, which is a reasonable time following execution of the note; and that the defendant had contended that said note was not due until such clearance was secured.

Appellant answered, alleging that there was a provision for such a clearance; denied that said note became due on January 15, 1956, or any other date and alleged that said note was not due and would not be due until a clearance had been obtained; denied the lack of provision or procedure for granting of a clearance by the commission; denied that the laws of the United States did not require such a clearance for the sale by defendant of the shares in question, to wit, those purchased under the offering circular dated November 18, 1954; denied that the S.E.C. lacked authority, had not power, could not then grant and that it was not possible for such a clearance to be granted by the S.E.C.; alleged that the S.E.C. did have power and authority at all times to grant a clearance; and as a special affirmative defense alleged that the condition in the contract which states that the note

shall be due and payable "on January 15, 1956, *or as soon thereafter as clearance is granted by the S.E.C. for the sale by Party of the Second Part* [appellant herein], of Cleary Oil Company Limited, Capital Stock shares, purchased under the Offering Circular, dated November 18, 1954," (italics added) expressly provides that no liability of the appellant shall arise and he shall have no duty to pay until the said condition occurs. Appellant further alleged that the fair market value of the 1500-share option was $50,000, and that the note has fully been paid because the consideration for the loan was usurious and that respondent and its president, Mr. Sandell, were alter egos.

The pretrial order recites, in part:

"Contentions of the Parties:

"Plaintiff alleges that the 'clearance' referred to in the pledge agreement dated April 15, 1955, is impossible of performance and, therefore, void, and that the note by its terms has become due and payable with interest and reasonable attorneys' fees, and that although demand has been made for payment, defendant refuses to pay.

"The defendant contends the 'clearance' is not an impossible event and the condition being breached, the note did not mature and defendant is not therefore in default. As a separate affirmative defense, the defendant asserts the following portion of the agreement dated April 15, 1955, which provides as follows:

"'As consideration for this loan, John B. Bailey does hereby grant to Victor I. Sandell, an option to

purchase 1500 shares Cleary Oil Company Limited, Capital Stock at $10.50 per share, U. S. Funds.',

"violates the usury laws of the State of California in that the consideration for the loan is in excess of the rate of interest allowed thereby. In this connection, the Answer alleges that the option had a value of $50,000.00 at the time it was granted and that *this option was exercised on or about December 8, 1955*, and this value should be applied in the payment of the principal of the note. The defendant also denies that $7500.00, or any other amount, is a reasonable sum to be allowed plaintiff as attorneys' fees." (Italics added.)

Issues remaining for trial were:

1. The amount of money, if any, due plaintiff as principal, interest, and attorneys' fees under his complaint;

2. Whether the "clearance," above referred to, is impossible of performance;

3. Whether or not said note is usurious and the relief, if any, the defendant may be entitled to under his counterclaim, all as framed by the pleadings.

Number 2 in the issues remaining for trial was added to the pretrial order by the judge at the special instance and request of the appellant. By logic, the words "issues remaining for trial" include the issues brought out in the pretrial order of "Contentions of the Parties."

After a trial of the action the court found for the respondent, granting judgment for $50,000 plus in-

terest, and attorneys' fees in the sum of $5,000, and the relevant findings are summarized as follows:

The court found that the appellant executed and delivered the note (finding No. 2); that the agreement provided that the note was due and payable on January 15, 1956, or as soon thereafter as clearance was granted by the S.E.C. (No. 3); that it was not true that said "clearance" was intended to be a condition precedent to the payment of the note but that there was an absolute promise to pay (No. 4); that the parties intended that the granting of the clearance was to enable the appellant to have a reasonable time to assure himself that he could safely sell said stock purchased by him under the November 18, 1954, offering circular without being in violation of the regulations of the S.E.C. (No. 5); and that a reasonable time for securing such clearance was 90 days after January 15, 1956 (No. 6).

The court also found that the shares of stock had no real value in excess of $10.50 per share and that the option to purchase said shares had no value which would constitute an interest rate on said loan of more than 10 per cent per annum; that V. I. Sandell or respondent had no intent to exact any sum which would constitute a usurious loan and that the appellant had no intent to offer anything of value in return for said loan which would also constitute a usurious loan; and that the respondent or V. I. Sandell did not intend to violate the usury laws and there was no corrupt or usurious agreement.

This court is bound by the familiar rules as to supporting the findings of the trial court, that it is the burden of appellant to show such a lack of substantial facts in the record that there is no ground upon which the trial court could have based any reasonable inference in support of its finding (*Kirchnavy v. Level*, 127 Cal.App.2d 586, 588 [274 P.2d 161]; *Endo v. State Board of Equalization*, 143 Cal.App.2d 395, 399 [300 P.2d 366]; *Estate of Arstein*, 56 Cal.2d 239, 240 [14 Cal.Rptr. 809, 364 P.2d 33]; *Estate of Goodhew*, 174 Cal.App.2d 75, 79 [344 P.2d 63]); that if there is a conflict in the evidence the findings of the trial court will not be disturbed (*Martinez v. Hudson*, 14 Cal. App.2d 42, 44 [57 P.2d 970]); that when a finding of fact is attacked on the ground of insufficiency of the evidence, the sole function of the appellate court is to determine whether there is any substantial evidence, contradicted or uncontradicted, which will support the challenged finding (*Key v. McCabe*, 54 Cal.2d 736, 738 [8 Cal.Rptr. 425, 356 P.2d 169]; *Primm v. Primm*, 46 Cal.2d 690, 693 [299 P.2d 231]); and any ambiguities in the findings of fact and conclusions of law are to be resolved in favor of sustaining the judgment (*Murphy v. Sheftel*, 119 Cal.App. 467, 469 [6 P.2d 549]).

In *Brewer v. Paul Hardeman, Inc.*, 183 Cal.App.2d 708, 712-713 [7 Cal.Rptr. 231], the court said: "Findings must be sufficiently definite and intelligible to dispose of the material issues. They are to be liberally construed on appeal to support the judgment. [Citation.] Where a court renders a judgment without making findings on all material issues of fact the de-

cision is against law and constitutes ground for reversal on appeal, provided it appears that there was evidence on that issue sufficient to sustain a finding in favor of the party complaining. [Citation.]

"After reading the transcript of the testimony and examining the exhibits, it is apparent that any change in the findings based on the evidence would not improve either plaintiff's position and adequate credible evidence supports findings and judgments denying any award to either plaintiff."

The court, in *Virtue v. Elgut*, 164 Cal.App.2d 480 [330 P.2d 879], said at page 484: "It is well settled that if findings are made upon issues which determine the cause, other issues become immaterial and failure to find thereon does not constitute prejudicial error."

Appellant claims that the court erred in finding that the note was due, and quotes rule 216 of California Rules of Court,* as follows:

"When filed, the pretrial conference order becomes a part of the record in the case and, where inconsistent with the pleadings, controls the subsequent course of the case unless modified at or before trial to prevent manifest injustice"; and claims that findings numbers 4 and 5 on the intention of the parties in referring to "clearance" in the agreement, are erroneous because they are contrary to the pretrial order.

The issues in this matter were fully developed by both sides during the trial (*Haseltine v. Haseltine*,

*Formerly Rules of the Superior Court, rule 8.8.

[1]203 Cal.App.2d 48 [21 Cal.Rptr. 238]). We think that the pretrial conference did set up all of the issues that were involved, and in *Fitzsimmons v. Jones*, 179 Cal.App.2d 5, 9 [3 Cal.Rptr. 373], where pretrial procedure is discussed, the court declared the issues, "One The amount, if any due plaintiff from defendants" and "Two, The amount, if any, that should be awarded defendants on their Cross-complaint" would be sufficient. Here, among the remaining issues, we have a similar statement plus the words "under his complaint."

Appellant did request modification of the pretrial conference order, which was made, and could have requested further changes had he so desired (*Baird v. Hodson*, 161 Cal.App.2d 687, 689 [327 P.2d 215]).

The court, in *Vaughn v. Jonas*, 31 Cal.2d 586, 605 [191 P.2d 432], said, "A party cannot permit an issue to be litigated and on appeal escape the consequences by claiming that such issue was not pleaded." Therefore, it would appear to us that the pretrial order sufficiently covered all of the issues that were involved on trial of this matter.

Appellant claims that impossibility must be proved first before a reasonable time for the performance by the obligee would be determined, as stated in *Bank of America v. Engleman*, 101 Cal.App.2d 390, 394 [225 P.2d 597]: "It is the law that where an event has been named as a time for the payment of money and such event can never occur, a reasonable time is by implica-

[1]Advance Report Citation: 203 A.C.A. 53, 57.

tion fixed as the maturity date of the promise to make payment." (See also *Estate of Baird*, 59 CalApp.2d 303 [138 P.2d 698]; and *Bartholomae Oil Corp. v. Oregon Oil etc. Co.*, 106 Cal.App. 57 [288 P. 814].)

Appellant consistently maintains that a clearance does exist, that it has a technical meaning to persons in the securities business, but claims that it was error for the court to sustain objections as to individuals attempting to define what a clearance was on the grounds that such is a question of law. Efforts to obtain a definition from appellant at oral argument were without avail in that appellant's definition of "clearance" was that it is a "word of art."

We have carefully read all of the Securities and Exchange Commission regulations in volume 3 of Federal Securities Law Reporter, paragraphs 68,201 to 68,207 (17 Code Federal Regulations, part 202; 11 Federal Register 177A-729, §§ 202.1 to 202.7). As we read these sections, they refer to the filing of registration statements as are authorized under the Securities and Exchange Commission as particularly set forth in United States Code Annotated, title 15, section 77s.

The word "clearance" is not found in any of the definitions under the rules and regulations of the Securities and Exchange Commission, nor does appellant cite its use in any of his citations of the law. We have been unable to find a definition for this word as far as securities are concerned, in Words and Phrases, or any other book or dictionary.

Section 1861 of the Code of Civil Procedure states: "The terms of a writing are presumed to have been used in their primary and general acceptation, but evi-

dence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance in which case the agreement must be construed accordingly."

It is said in *Ermolieff v. R.K.O. Radio Pictures,* 19 Cal.2d 543, 552 [122 P.2d 3], quoting from Restatement, Contracts, section 248, page 352, regarding custom or usage: " 'Where both parties to a transaction are engaged in the same occupation, or belong to the same group of persons, the usages of that occupation or group are operative, unless one of the parties knows or has reason to know that the other party has an inconsistent intention.' "

We think, for the reasons stated herein, that the word "clearance" was ambiguous and that the trial court had the power with which to find as it did

Code of Civil Procedure section 1856 sets forth the rule as to agreements reduced to writing and the exclusion of parol evidence; section 1860 sets forth the construction of instruments; and section 1861 refers to admitting evidence where the terms of a writing have a "local, technical, or otherwise peculiar signification."

Inasmuch as the term "clearance" apparently does not exist, its meaning between the parties can be gone into by the court, as was done here, to ascertain the "technical" or "peculiar signification."

In *Ribiero v. Dotson,* 187 Cal.App.2d 819, 821 [9 Cal. Rptr. 909], the court said: "Also, when the language of a contract is fairly susceptible to one of two con-

structions (i.e., when it is ambiguous) extrinsic evidence may be considered 'not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties.' "

The offering circular, executed by appellant, Thomas Leo Cleary and William A. Crocket and Dora L. Hopkins, indicates on its "face" that it is exempt from registration, being under $300,000 (15 U.S.C.A. § 77c, subd. (b)). We find nothing in the rules and regulations which would add to the amount previously sold and not exempt the very resale of that stock so that, together, such would exceed $300,000 and be now subject to registration with the S.E.C.

Appellant contends that he, having been an underwriter of this issue, could not sell his own stock which he obtained under that issue without this so-called "clearance."

While section 77c, title 15 of the United States Code Annotated, relates to offerings in excess of $300,000, section 77d provides that the above section does not apply to transactions by any person other than an issuer, underwriter, or dealer, except as to transactions taking place prior to 40 days after the security was offered to the public by an issuer or by an underwriter. In other words, had the offering which was made November 18, 1954, been in excess of $300,000, then the offering circular or prospectus would have had to have been filed through and registered with the Securities and Exchange Commission under the regulations as mentioned above and then a former underwriter who sold all of the stock issue would have to wait 60 days before he, personally, could sell his own

stock. This, however, would not apply to any unsold securities by the corporation.

In any event, whether the stock was exempted or was not exempted, the 40-day limitation would have expired long before appellant borrowed the money from respondent. The appellant was not an underwriter because he and his partner had sold all of the stock as underwriters but he, as an individual, and Bailey & Company, did buy stock but not as a subscriber.

It cannot be said that appellant was a person in control within the meaning of the regulations of the S.E.C. because at the alleged due date of the note and option, he was no longer the underwriter, a subscriber, or a director, having failed to be reelected to the board of directors in October 1955. Sandell became on appointed director in February 1955.

As to the matter of "clearance," if it does exist it would not be required under these facts because of the regulations of the S.E.C., and a finding would be unnecessary in view of the other findings.

Mr. Cross, an expert on the S.E.C. regulations, testified in general that the technical meaning of the word "clearance" is doing whatever is necessary concerning sale of shares without violating any of the provisions of the Federal Securities Act of 1933.

The appellant also testified that the term "clearance" generally meant using the registration of the company or getting a registration of his own or to comply with the regulations of the S.E.C. It might also be easily said that inasmuch as such a clearance

is not required by the S.E.C. regulations, that automatically the person selling the stock has a clearance to do anything he wishes with his stock at any time.

The appellant, not waiting for any so-called "clearance," actually sold under the offering circular of November 18, 1954, 1,500 shares of stock on December 8, 1955, to Mr. Sandell at the price of $10.50 a share. This was under the option to Mr. Sandell and so exercised, in spite of the clause in the option that provided for the option to become effective on November 19, 1955, or as soon thereafter as clearance was granted from the S.E.C. As admitted by appellant in his answer and which is also set forth in the contentions in the pretrial order, as well as by appellant's counsel at oral argument, the option was exercised and the stock is now in escrow in Mr. Sandell's name. It is difficult for us to understand the appellant's claim of the necessity of a "clearance" when he actually had transferred this very stock in December 1955 before the note was due.

We think that appellant could have sold this stock at any time without any action on his or respondent's part and it was unnecessary to make a finding on "impossibility."

The court found that the shares of stock at the time of the giving of said option or any time thereafter had no real or demonstrable value or any market value in excess of $10.50 per share; that the option had no monetary value, that it is impossible to give a value to it and there was at the time of the giving of the option no value to it which would constitute an interest rate on said loan of more than 10 per cent per annum.

Appellant, in setting up the special defense of usury, assumes the burden of proving whether or not usury exists, as it is never presumed (*Traders Credit Corp. v. Thyle*, 116 Cal.App. 252 [2 P.2d 568]). Appellant did not carry this burden.

Charter v. Olson, 137 Cal.App.2d 636, 637-38 [290 P.2d 867], reestablishes the rule that before the appellate tribunal can reverse a judgment on the ground of insufficiency of the evidence, every favorable inference and presumption which may fairly be deduced from the evidence shall be resolved in favor of the prevailing party.

The appellant has testified that this option was worth $60,000, and has outlined several sales which were made by him as a broker to his clients in excess of $10.50 per share; has referred to an option which he gave to President Cleary in 1956 to purchase stock for $35 per share (however, this in fact was never exercised); that some stock was sold by him at $30 per share, other stock at $20 per share in December 1957. Mr. Crocket, a director of the corporation, testified that at one time he believed the stock might have had a speculative value of $50 per share, but he also testified that he was not interested in figuring whether it was worth $10 a share or $6 or $20, as he wasn't interested in buying any more, even at the price of $10.50 per share.

Mr. Orchard, one of the directors and a former client of appellant, testified that he bought similar stock of the corporation at the time of this option at $10.50 per share but his opinion was that the stock was worth about half that much.

Appellant has also referred to the conduct of the persons closely connected with the company, such as Mr. Sandell's conduct in testifying that even though the stock was never worth more than $5 or $6 per share, he loaned $40,000 in February 1955 to the company on the basis of exercising his preemptive rights and that he had bought other stock at $20 per share but testified that he did that to keep Mr. Cleary active in the company.

Without merit is appellant's claim that there were possible different valuations of the stock as evidenced by executive meetings of a few members of the board in August 1955. The discussions about a four-way stock split to be sold at $10.50 per share were pure speculation as to what the board of directors might do in the future and have no relation to the valuation of the stock at the time the option was given.

In *Estate of Spitly*, 124 Cal.App. 642, 645 [13 P.2d 385], quoting from *Heiner v. Crosby*, 24 F.2d 191, it is said: "'Sales made at a particular time and place may be significant but the price paid is not necessarily decisive of fair market price or value. The fact of sales, in itself and without regard to the circumstances under which the sales were made, does not conclusively establish either statutory fair market price or value. Sales made under peculiar and unusual circumstances, such as sales of small lots, forced sales, and sales in a restricted market may neither signify a fair market price or value, nor serve as a basis on which to determine the amount of gain derived from the sale.'"

We think that the court, after hearing all of the evidence presented by the appellant and the evidence

by the respondent, properly found that the option had no value at the time the option was given upon which the charge of usury could be made. A close examination of the financial statements and minutes and records of the corporation indicates that the appellant had been a stockholder and director of this corporation prior to November 1954; that he was a director at the time he took part in obtaining the offering permit of November 18, 1954, from the California Division of Corporations and in issuing the offering circular; that he also was the underwriter who handled the offering; that he was a director at the time that he signed the offering prospectus and that Mr. Sandell did not become a director until February 1955. In other words, the appellant had much more information as to the condition of this company prior to Mr. Sandell's becoming a director; he knew the financial condition of the company as is particularly shown by the California Corporations Permit of October 1954 (see Corp. Code, § 834; *Austin v. Hallmark Oil Co.*, 21 Cal.2d 718, 729 [134 P.2d 777]), which permit further shows that originally there were 20,000 shares of stock issued and that the net worth of the company was $22,814.75; and in the offering prospectus of November 1954, where the information is given as to what the funds were to be used for, it also shows that the appellant was to receive a great deal of the money in repayment to him of substantial loans to the corporation and 10 per cent commissions, and after paying all these debts off there would still be left only $21,000 for further use by the company, with the capital liability of the corporation being extended an ad-

ditional amount of nearly $300,000. There is no doubt that this corporation was in financial distress and shareholders who were advancing moneys to the corporation and exercising their preemptive rights to purchase additional shares at $10.50 per share were only doing so in the hopes of saving the corporation and ultimately "striking it rich."

While the appellant constantly maintains that the financial statements do not really show the future possibilities of the company or its potential success in operating its various oil leases, we can only further note that subsequent to the financial statements, in November 1954, the company went from bad to worse. Subsequent balance sheets show that additional money was subscribed to the company in which the capital stock ultimately became listed at $900,000, assets were $918,573, and liabilities were $917,544, and the company had a deficit statement in that particular year, 1956, of some $966,448 and according to the statement, had two lawsuits against it in which the amount claimed was $477,000 plus other contingent liabilities, and had a loss of $43,484.32 for 1956.

One of the statements of Cleary Oil Company Limited lists as an asset the sum of $436,000 which is due from its subsidiary which, itself, was insolvent and was overdrawn at the bank at that time. The company's profit and loss statements for various years after 1955 indicated constant, continual deficits in its operation.

Considering the evidence of transactions in options, evidence of transactions in this unlisted stock, opinion

evidence and conduct of the persons giving opinion evidence on the condition of the corporation, the court properly made its finding that the option had no value and that the stock was not worth in excess of $10.50 per share. Any information which was later acquired by Mr. Sandell after becoming a director and later, president, would not, in this court's opinion, relate back to indicate that at the time the option was given this stock had any value. All of the stockholders naturally had a confident feeling that ultimately the stock would be valuable and all hoped that the future would be better than the past.

While it is true that a bonus paid for the making of a loan must be considered as interest in arriving at whether or not there is usury (*Otis v. I. Eisner Co.*, 1 Cal.App.2d 496, 499 [46 P.2d 235]), we do not think here that there was any bonus whatsoever as consideration for the loan, that the appellant was merely anxious to invest more money in this company in spite of its financial condition, and that he wanted this loan so that he could pick up his preemptive rights shares at $10.50 per share, and what movement of stock there was purely on the basis of the various interested members trying to gain a position in the company either as president, director and stockholder or salesman. Though this contract is not usurious on its face, the question of intent to evade the law is a necessary and vital element and must be proven affirmatively in order that usury may be found (*Moore v. Dealy*, 117 Cal.App.2d 89, 94 [254 P.2d 888]), which appellant did not prove.

In *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481 [57 S.Ct. 569, 81 L.Ed. 755], the court affirmed a judgment where the shares were regarded as highly speculative and where a sale thereof was impossible but not having a fair market value capable of being ascertained with reasonable certainty.

While Mr. Sandell bought stock from the president of the company, Mr. Cleary, at a price in excess of $10.50, his testimony was that he did so in order to keep Mr. Cleary active in the company inasmuch as Mr. Sandell felt that the company needed his knowledge in handling the affairs in Canada.

The value of the stock from the date the option was given is immaterial even though it may later become valuable. (See *Schiff v. Pruitt*, 144 Cal.App.2d 493 [301 P.2d 446].)

The lender is charged with the value of property at the time he receives it regardless of what is later received from the sale of it (*Calimpco, Inc. v. Warden*, 100 Cal.App.2d 429, 448 [224 P.2d 421]). Mr. Sandell received the option on April 15, 1955, and its value, if any, is to be ascertained as of that date.

The judgment is affirmed.

Brown, J.

Stone, Acting P. J., concurred.

Conley, J., deeming himself disqualified, did not participate.

Filed February 13, 1963.

James G. Huggins, Clerk.

In the District Court of Appeal
State of California
Fifth Appellate District

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5 Civil No. 116

Sandell, Inc., a corporation,
Plaintiff and Respondent,
vs.
John B. Bailey,
Defendant and Appellant.

MODIFICATION OF OPINION

The opinion filed herein on February 13, 1963, is amended by substituting for the words "Securities and Exchange Commission" appearing at line 16, page 8, of the opinion, the following words:

"Securities Act of 1933"

Brown, J.

I concur: Stone, Acting P. J.

(Conley, P. J., deeming himself disqualified, did not participate.)

Filed Mar. 14, 1963,
James G. Huggins, Clerk.

Appendix B

April 10 1963

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State Building
Los Angeles, California

Apr 9—1963

Dear Sir: I have this day filed Order

Hearing Denied

In re: 5 Civ No. 116

Sandell

vs.

Bailey

Respectfully

William I. Sullivan

Clerk

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 1088

JOHN B. BAILEY,
Petitioner,
vs.
SANDELL, INC., a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court
OF THE
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OCTOBER TERM, 1962

No. 1088

JOHN B. BAILEY,
Petitioner,

vs.

SANDELL, INC., a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Sandell, Inc., a corporation, respectfully presents its brief in opposition to Petitioner's Petition for Writ of Certiorari on file with this Court.

PRELIMINARY STATEMENT

In his Petition for a Writ of Certiorari, Petitioner, who was Defendant in the Trial Court, does two things: First (Petition, pp. 8-16), he attempts to base

an argument that there is a question of law concerning the Securities Act of 1933 (15 U.S.C.A. Sect. 77) upon an assertion that the factual question of whether he was an underwriter was decided erroneously by the Trial Court. Secondly (Petition, pp. 16-17), he charges that the Court "rewrote" the agreement between the parties and offers in support of such a contention the false assertion that, "It is conceded by all parties that the clearance was necessary before the note became due . . ." (Petition, p. 17), and the equally false statement that, "The evidence is clear in this case that it was the intention of the parties that before the note could become due that a clearance must be had . . ." (Petition, p. 17). That neither of Petitioner's positions is tenable, and that neither furnishes any ground for review by the Supreme Court of the United States will be hereinafter demonstrated.

ARGUMENT

I.

THERE IS NO QUESTION OF INTERPRETATION OF A FEDERAL STATUTE OR OF THE REGULATIONS OF A FEDERAL AGENCY.

On page 8 of his Petition, Petitioner, after stating that, ". . . the District Court must have found that there was no restriction of any kind . . .", quotes various sections of the Securities Act of 1933 and then argues that Petitioner was at all times an underwriter so that he needed "clearance," whatever that may be, in order to sell his shares of stock pur-

chased by him under the Offering Circular of November 18, 1954, therein referred to.

In the first place, this argument ignores the findings of the Trial Court noted in the Opinion of the District Court of Appeal (Petition, Appendix A, p. vii) that "clearance" was not a condition precedent to payment, but that there was an absolute promise to pay (Finding No. 4, Cl. Tr. p. 93), that the parties merely intended that the reference to granting of "clearance" was to enable the Petitioner to have a reasonable time to assure himself that he could safely sell said stock purchased by him under the November 18, 1954 Offering Circular (Finding No. 5, Cl. Tr. p. 93), and that ninety days after January 15, 1956, was a reasonable time for the securing of such "clearance" (Finding No. 6, Cl. Tr. pp. 93-94).

The foregoing findings made a finding as to the meaning of the word "clearance" unnecessary because it was not a condition precedent to Petitioner's obligation to repay the money he had borrowed. Petitioner, however, chooses to ignore not only this fact, but also to ignore the fact that the District Court of Appeal, in discussing the meaning of the word "clearance", was merely pointing out that even had a finding on the subject been necessary, it could not have helped Petitioner had it been made, for as the District Court of Appeal said in its Opinion (Petition, Appendix A, p. xiv):

> "As to the matter of 'clearance,' if it does exist it would not be required under these facts because of the regulations of the S.E.C., and a

finding would be unnecessary in view of the other findings."

Assuming arguendo, however, that such a finding regarding "clearance" and the various meanings assigned to it by Petitioner were material, this cynical effort of Petitioner to show that he was still an underwriter, after all, is both an improper reargument of the evidence and wholly useless to Petitioner as well. The question of whether one has ceased to be an underwriter is one of fact; in fact, it depends on the purchaser's intent either to buy for investment or for further distribution, which intent is, itself, a question of fact (Loss, Securities Regulations, 2d Ed. 1961, Vol. 1, pp. 551 to 552, 665). True, Petitioner was the underwriter for the issue of 28,750 shares issued under the November 18, 1954 Circular, but he sold all of those shares according to his own statement, and therefore ceased to be an underwriter (Rep. Tr. p. 8, lines 7-11; p. 9, lines 7-11; p. 14, lines 22-24).

In this connection, the following appears in C.C.H. Federal Securities Law Reporter, Para. 2266.03:

> "Transactions by an underwriter are not exempted. It is true, however, that there is a point of time when a person who has become an underwriter ceases to exercise any underwriting functions and *therefore, ceases to be an underwriter.* When that point is reached such a person would be subject only to whatever restrictions would be imposed upon him as a dealer." (House Committee Report No. 85, 73rd Cong., First Session, p. 16 (emphasis ours).

Petitioner testified that he sold all of the 28,750 shares of the issue in question pursuant to the underwriting agreement and, in so doing, purchased some of them for his own account, as he had a right to do under the underwriting agreement (Rep. Tr. p. 9, line 12 to p. 10, line 7). Now, Petitioner says that this is not true, but that he purchased these shares with a view toward further distribution (Petition, p. 12). One can but wonder at this belated statement of secret intent to redistribute, not mentioned to Respondent when Petitioner insisted on putting in a reference to "clearance" in their agreement (Rep. Tr. p. 35, lines 10-13, p. 41, lines 3-19), and not mentioned by Petitioner at the trial of this action. If Petitioner never intended to purchase these shares for investment but only to distribute them as underwriter and dealer, then it is suggested that maybe he should have sold them along with the rest of the 28,750 shares he sold to various persons as such underwriter, including some to Mr. Sandell (Rep. Tr. p. 14, lines 6-24).

None of the cases cited by Petitioner on pages 13 to 16 of his Petition hold that the question of whether one is, or is not, an underwriter is any more than a question of fact, and, therefore, no useful purpose would be served by any further discussion of them here.

The statement on page 16 of the Petition to the effect that the decision of the District Court of Appeal of the State of California is contrary to the Federal cases cited by Petitioner in that it holds that

a person in the position of Petitioner could lawfully sell an unregistered security to the general public without notice to, or consent of, the Securities and Exchange Commission, is a deliberate misstatement of the Opinion of the District Court of Appeal.

The charge that the District Court of Appeal misconstrued the Securities Act of 1933 is not only incorrect, but is immaterial in view of the finding of the Trial Court that clearance was not a condition precedent to payment of the note (Finding No. 4, Cl. Tr. p. 93, lines 12-20).

It is also interesting to note that Petitioner did not wait for any so-called "clearance", but actually sold 1,500 shares issued under the Offering Circular of November 18, 1954, to Mr. Sandell at the price of $10.50 per share (Petition, Appendix A, p. xv; Rep. Tr. p. 39, line 22 to p. 41, line 2).

II.

NEITHER THE TRIAL COURT NOR THE DISTRICT COURT OF APPEAL REWROTE OR OMITTED ANY LANGUAGE FROM THE AGREEMENT OF THE PARTIES; THE TRIAL COURT MERELY INTERPRETED THE AGREEMENT.

Petitioner indicates that the provision for clearance was ignored by the Court. In so stating, Petitioner ignores Finding No. 4 and Finding No. 5, both of which interpret the agreement and make a finding of fact as to the reason why the reference to clearance was inserted in the agreement (Cl. Tr. p. 93, lines 12-28). The Trial Court made it quite clear that the

question of the date of maturity of the note and the question of whether clearance was, or was not, a condition precedent to payment were matters in issue before the Court (Rep. Tr. p. 259, lines 2-23; p. 261, line 22 to p. 265, line 19), and also pointed out at the time that its purpose was to allow counsel every opportunity to be sure of the theory upon which the Court was proceeding (Rep. Tr. p. 267, line 7 to p. 273, line 17).

The interpretation and construction of the agreement and the question of whether or not clearance was necessary before the note became due was at all times an issue before the Court and the contentions in this respect of both parties were stated in the Petitioner's own pre-trial statement (Cl. Tr. p. 67, line 24 to p. 68, line 5).

The briefest of examinations of the foregoing references to the Clerk's and Reporter's Transcripts is a complete answer to the false assertion by Petitioner, on page 17 of his Petition, that all parties conceded that clearance was necessary before the note became due.

As to the statement on that same page by Petitioner that, "The evidence is clear . . .", that it was the intention of the parties that the note could not become due without a clearance being had, is a statement directly contrary to the finding of the Trial Court on that issue of fact (Finding No. 4, Cl. Tr. p. 93, lines 12-20). Petitioner's statement is no more than an improper effort to reargue the evidence in contravention of the universal rule that the only func-

tion of an Appellate Court is to determine whether there is any substantial evidence, contradicted or uncontradicted, which will support a challenged finding. This rule was noted by the District Court of Appeal in its Opinion, with appropriate reference to authorities (Petition, Appendix A, p. viii).

CONCLUSION

It is respectfully submitted that under no theory is there a Federal question involved in this action, and that Petitioner has presented no ground upon which to base its Petition for a review by the Supreme Court of the United States.

Dated, Fresno, California,
May 10, 1963.

Respectfully submitted,
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